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# International Environmental Law and the United Kingdom

ROBIN CHURCHILL\*

## INTRODUCTION

Some environmental issues are purely national in scope. Many others, however, have an international dimension. Thus, to the extent that law has a role to play in dealing with environmental issues, international law as well as national law is required. The aim of this paper to look at the development and implementation of a number of selected areas of international environmental law in relation to the United Kingdom (UK). The UK's international legal obligations are an important factor, although only one of several factors, in shaping the domestic environmental policy and legislation of the UK. At the same time domestic policy considerations also affect the degree to which the UK is prepared to assume international legal obligations – and, as we shall see, the assumption of such obligations is almost entirely voluntary. The paper thus has a double focus – looking both at the contribution the UK has made and is making to the development of international environmental law and at the impact of international environmental law on domestic environmental policy and law in the UK.

The remainder of this introductory section will explain, particularly for the benefit of readers without any knowledge of international law, how international environmental law (a branch of international law) is developed, and then list the areas of international environmental law which have been chosen for examination and explain the reasons for this choice. The rest of this paper will then examine the areas chosen from the point of view of the double focus just referred to.

## THE DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW

The main vehicle for the development of international environmental law is the general multilateral treaty, that is, a treaty (or agreement or convention – the terms are synonymous) between three or more states, either on a regional

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or world-wide basis. In examining the role of any particular state in the development and implementation of an international environmental treaty, one can examine that state's role in four stages:

- (i). Its role in the preparation and negotiation of the treaty concerned. Such an examination is not always easy, because not all treaties have publicly available records of their negotiation.
- (ii). Signature and ratification by that state of the treaty concerned. Signing a treaty does not bind a state, but indicates that it is considering ratifying the treaty. It is only the later act of ratification that leads to a state being legally bound by the treaty. Normally multilateral treaties require a specific number of ratifications before they enter into force. Once in force, they are only binding on those states that have ratified.
- (iii). Formal implementation, whether by legislation or otherwise, of the treaty concerned once it has been ratified. For so-called dualist countries such as the UK (which view international law and national law as two separate systems of law), treaties, even when ratified, have no status in domestic law: they only become part of domestic law when they have been implemented by legislation. Thus, a treaty which is intended to affect matters at the domestic level must be implemented by legislation if it is to have such effect. In so-called monist countries (which view international law and national law as both part of a single system of law) such implementation is not normally required: once the treaty has been ratified it is automatically part of the law of the land.
- (iv). The way the formal methods of implementation actually operate in practice. It is not unknown for a treaty to have been formally implemented by legislation but for it not actually to be applied in practice in the state concerned because of defects in the implementing legislation or because the legislation is not properly given effect to.

Although the general multilateral treaty is the main vehicle for the development of international environmental law, there are two other, subsidiary, ways in which such law is being developed. The first of these is decisions of international organizations. Some international organizations have legislative or quasi-legislative powers because they can make decisions which bind their member states. The best example of such an organization is the European Community (which is discussed in the previous paper). Other examples include the International Maritime Organization (the UN's specialized agency for shipping), the Oslo and Paris Commissions (concerned with pollution of the North Sea and North-East Atlantic from the dumping of waste and land-based sources, respectively), a number of international fisheries commissions, and the International Whaling Commission. The final way in which international environmental law is being developed is through the decisions of *ad hoc* international conferences, such as the three conferences on pollution of the North Sea (held in 1984, 1987, and 1990) and a series of conferences on global warming. Although the decisions of such conferences are primarily political in character, they are not without some legal

significance. First, undertakings given by states at such conferences, even though essentially political in nature, may in some circumstances become legally binding, either because they are regarded as unilateral declarations intended to be binding or through the doctrine of estoppel.<sup>1</sup> Secondly, even if such undertakings are not legally binding, they may in time be translated into treaties or decisions of international organizations and so become legally binding in this way. Decisions of international conferences of this character are often known as 'soft law'.

## CHOICE OF TOPICS FOR STUDY

Although it is one of the youngest branches of international law, international environmental law already comprises a very substantial body of law. It is obviously not possible in a short essay to look at international environmental law in relation to the UK other than in a few selected areas. The areas chosen for study in this paper are the following: (i) depletion of the ozone layer and global warming; (ii) acid rain; (iii) pollution of the sea as a result of the dumping of waste; (iv) conservation of fauna and flora, focusing particularly on the Berne Convention.

These areas have been chosen because they cover a reasonable spread of major international environmental issues, most of these issues are topical and fairly well understood by non-specialists, and finally the international law applicable to them illustrates all the stages and forms of international environmental law-making described above as well as being susceptible to the double-focus examination of each topic proposed above. Nevertheless, the selection of areas for study is open to the charge of eclecticism: some may also feel that issues have been selected which show the UK in a worse light than other environmental issues which have not been chosen for study. Some attempt will be made to answer these charges in the conclusion to this paper.

## DEPLETION OF THE OZONE LAYER AND GLOBAL WARMING

Although in some ways depletion of the ozone layer and global warming are separate issues, they are nevertheless interlinked, which is why they are treated together in this paper. The ozone layer in the upper atmosphere (stratosphere) prevents most of the dangerous ultra-violet radiation from the sun getting through to the earth's surface. In the 1970s it was discovered that the ozone layer was thinning, and in 1985 a large hole in the ozone layer was discovered over the Antarctic. Subsequently, this hole has increased in size and has at times drifted northwards over Australia. In 1989 a hole was discovered over the Arctic. The thinning and holes in the ozone layer are caused by the chlorine in chlorofluorocarbon gases (CFCs), which are used as propellants in aerosol sprays, refrigerants and coolants in air-conditioning plants, and also in insulation products, cleaning agents and plastic foam packaging. The

consequence of depleting the ozone layer is an increase in ultraviolet radiation reaching the earth. This in turn causes an increase in skin cancer and cataracts and other eye diseases, and may also suppress the immune system in humans and slow plant growth.

It is thought that global warming, about whose existence and, especially, its likely extent there is still considerable uncertainty, will result from increasing concentrations of certain gases in the atmosphere from man-made emissions, whose effect (like the glass in a greenhouse) is to let in the sun's radiation but to allow little heat to escape from the earth. This effect is known as the greenhouse effect and the gases causing it are known as greenhouse gases. The connection between global warming and the depletion of the ozone layer is that the gases causing the latter, CFCs, are powerful greenhouse gases, currently responsible for about fourteen per cent of the greenhouse effect. The other greenhouse gases are carbon dioxide (fifty per cent), methane (eighteen per cent), ground-level ozone (twelve per cent) and nitrous oxide (six per cent). Furthermore, depletion of the ozone layer allows, as explained above, more of the sun's ultraviolet radiation to reach the earth's surface, which not only warms the earth thus adding to the global warming resulting from the greenhouse effect, but also may damage the phyto-plankton under the ocean surface, which in turn will reduce the oceans' capacity to absorb carbon dioxide from the atmosphere, thus adding to the amount of carbon dioxide in the atmosphere and contributing to the greenhouse effect.

Although the two issues are interlinked, we will consider international efforts to prevent further depletion of the ozone layer through controlling emissions of CFCs first, before turning to the control of other greenhouse gas emissions: for reasons of space it is not possible to consider other aspects of global warming, such as preventing further destruction of tropical forests.

Emissions of CFCs are controlled at the international level by the Vienna Convention for the Protection of the Ozone Layer of 1985<sup>2</sup> and the Montreal Protocol on Substances that deplete the Ozone Layer of 1987.<sup>3</sup> The Vienna Convention is largely a framework treaty: it does not lay down any specific measures for controlling emissions of CFCs but leaves these to be elaborated through subsequent protocols (that is, supplementary agreements) to the convention. The Montreal Protocol is the first, and so far only, such protocol. It provides that the consumption and production of CFCs must be frozen at 1986 levels as from 1989, and then reduced to eighty per cent of 1986 levels by 1994 and fifty per cent by 1999. In addition, the consumption and production of halons (also ozone-depleting gases) must be frozen at 1986 levels by 1992. In both cases there is some relaxation of these timetables for developing countries.

In considering the role of the UK in the development and implementation of the Vienna Convention and its Montreal Protocol, we will use the four-stage framework outlined at the beginning of this paper, examining in turn the UK's role in the negotiation of the convention and protocol, its ratification of these instruments, and their formal and practical implementation. As regards the first of these, negotiations, it is difficult to evaluate the UK's role in the

negotiation of the Vienna Convention and Montreal Protocol. This is because in these negotiations EC member states negotiated as a bloc (the subject matter of the negotiations falling partly, although not totally, within the competence of the EC), and there is no public record of how the Community reached its negotiating position. It has been suggested, however, that the UK, possibly under pressure from ICI, thought to be the largest CFC producer in the EC, may have put a brake on the Community's negotiating position.<sup>4</sup> Nevertheless, the EC did play a reasonably constructive role in the negotiations on the Montreal Protocol through its insistence that the production of CFCs must be controlled (whereas the United States of America and some other western countries had initially argued strongly that only certain forms of consumption should be controlled), although it had to accept a stricter timetable of cuts in production than it had originally proposed.<sup>5</sup>

Along with all other EC member states and the Community itself, the UK has ratified both the Vienna Convention and the Montreal Protocol. As explained above, ratification of a treaty which has implications for matters at the domestic level (as the Montreal Protocol clearly does) normally in the UK requires the enactment of implementing legislation. In fact there has been no such UK legislation: instead, because the EC itself is a party to the Montreal Protocol, the Protocol has been implemented for EC member states at the Community level by a regulation.<sup>6</sup> As far as practical implementation is concerned, it is too early to make any complete judgment. This is because all that the Montreal Protocol at present requires of its parties is that they have stabilized their consumption and production of CFCs at 1986 levels. As far as the writer is aware, no figures for UK consumption and production of CFCs for 1989 are yet publicly available, so that it is not possible at present to say whether the Montreal Protocol has so far been complied with. Nevertheless, it is likely that it has been, since the Government stated in February 1990 that it believed that British industry had reduced its use of CFCs by fifty per cent.<sup>7</sup>

As far as the second aspect of the double focus of this paper is concerned, namely the impact of international environmental law on UK domestic law and policy, the fact that the UK has probably already gone as far as, if not considerably further, than the requirements of the Montreal Protocol is probably not due very much to the protocol, which was signed only in September 1987 and came into force only on 1 January 1989. Rather, it is due to a number of other factors. These include: consumer pressures, which have led to a significant reduction in the use of CFCs in aerosols; voluntary schemes for recycling CFCs operated by local authorities and retailers in conjunction with ICI; an EC decision of 1980 which required a thirty per cent reduction in the use of CFCs in aerosols by 1981 as compared with 1976;<sup>8</sup> and voluntary agreements negotiated by the Commission with various sectors of industry for a reduction in the use of CFCs. It will be observed that conspicuous by its absence from this list of factors is any Government administrative or legislative action. This is no coincidence. The Government's view is that CFC emissions should be controlled through targets being set internationally,

and then leaving it to industry to determine the means by which such targets are to be achieved.<sup>9</sup> This is in keeping with the present Conservative Government's general philosophy of keeping the regulation of industry to a minimum.

Almost as soon as it was signed, the Montreal Protocol was widely criticized for not going far enough in controlling emissions of CFCs. In the steps that have recently been taken to tighten up the provisions of the Montreal Protocol, it is possible to detect a more active role by the UK. This is no doubt in part a result of Mrs. Thatcher's recent display of a strong personal interest in global climate change (discussed below). Thus, in March 1989 the UK hosted the Intergovernmental Conference on Protection of the Ozone Layer, at which widespread political agreement was reached on the need to tighten up the Montreal Protocol. Just over a year later, in June 1990, the UK again acted as host for the meeting which formally amended the Montreal Protocol. These amendments require the production and consumption of CFCs to be phased out completely by 2000. Along with its fellow EC member states, the UK had proposed that the final phase-out date should be 1997, but this was not acceptable to the United States of America, the Soviet Union, and Japan. It is likely nevertheless that the EC will unilaterally adopt 1997 as the phase-out date, as a draft regulation to this effect, proposed by the Commission,<sup>10</sup> is currently being considered by the Council of Ministers. In any case, the new timetable of the Montreal Protocol is to be examined with a view to possible further revision in 1992.

Turning from CFCs to other greenhouse gases, international efforts to control the emissions of such gases are only just beginning. It will be much more difficult to reach agreement on control measures for such gases than it was for CFCs, both because of the greater uncertainty over the consequences of greenhouse gas emissions and because of the much greater cost and difficulty in reducing such emissions. As mentioned above, the main greenhouse gases, apart from CFCs, are carbon dioxide, methane, ozone, and nitrous oxide. The main sources of man-made emissions of carbon dioxide are the burning of fossil fuels (oil, gas, coal) in power stations, factories and car exhausts, and the burning of wood, especially tropical forests. The most feasible ways of reducing such emissions are increased energy efficiency; using gas instead of coal in power stations (gas emits only sixty per cent of the carbon dioxide emitted by coal for the same amount of energy); generating more electricity from renewable sources (wind, waves, tide, sun) and possibly, and more controversially, from nuclear power stations; developing more efficient engines for cars and discouraging private motoring by better public transport; and less burning of forests. The main sources of emissions of methane are agriculture (from the guts of ruminants – cattle, sheep, camels – and from water-logged fields such as rice paddies), rotting organic matter in refuse tips, the burning of wood and other vegetation, and leakages from gas pipes and mines. The main sources of nitrous oxide emissions are car exhausts, fossil fuel combustion, nitrogenous fertilizers, ploughing fields, and burning vegetation. The most feasible ways of reducing emissions of nitrous oxide and methane are by



burning less fossil fuels, wood, and vegetation, reducing the use of nitrogen in fertilizers, and dumping less rubbish in tips and recycling or burning it instead. Emissions of ground-level ozone come largely from vehicle exhausts. They can be reduced by fitting catalytic converters to cars, although this increases emissions of carbon dioxide and nitrous oxide.

International efforts to deal with the greenhouse effect have been focused initially in the Intergovernmental Panel on Climate Change (IPCC), set up jointly by the World Meteorological Organization (WMO – a UN specialized agency) and the UN Environment Programme (UNEP) in November 1988. The IPCC has three working groups. Working group I has been concerned with the scientific aspects of global climate change, working group II with the effects of climate change, and working group III with strategies to limit or adapt to climate change. The IPCC was due to publish a report in time to be discussed at the Second World Climate Conference, held in November 1990. Thereafter it is hoped to begin negotiating and drafting a climate change convention, with protocols setting emission limits for various greenhouse gases. It is further hoped that these negotiations will be completed in time to allow such a convention (if not its protocols) to be opened for signature at the UN Conference on Environment and Development, due to be held in Brazil in June 1992.

Mrs. Thatcher has taken a strong personal interest in the question of global climate change. This question featured prominently in the important speech she made to the Royal Society in September 1988 in which she first revealed an increased awareness of environmental issues. In April 1989 she hosted a seminar on global warming at 10 Downing Street. This personal interest of Mrs. Thatcher's no doubt explains, at least in part, why the UK has played a fairly prominent role in the work of the IPCC, in particular by chairing working group I. In addition, the UK, together with Canada and Malta, has acted as a co-ordinator for the legal measures topic group of Working Group III, which is considering elements for inclusion in a climate change convention. The Government has also increased funding in the UK for scientific research on climate change, at a time when state funding for scientific research generally is declining, and the results of this research are being fed into the work of the IPCC.

Although, as indicated above, real negotiations on controlling emissions of greenhouse gases have yet to begin, the question of such controls has been discussed, and the need for them generally recognized, at a number of inter-governmental conferences held during the past two years. The UK has attended most of these conferences. The major exception was a conference held at The Hague in March 1989 organised by France, the Netherlands, and Norway (which in many ways has been the most radical of these conferences in the approaches it has canvassed), when Mrs Thatcher declined an invitation for the UK to attend as a deliberate snub to the organizers. The reason for this snub appears to be because she thought the organizers were upstaging a conference she had hosted the previous month and because it was known that the conference was to discuss the need for new international machinery of



which Mrs Thatcher (at that time at least) disapproved. At the conferences the UK has attended, its attitudes to the control of greenhouse gas emissions have gradually changed. While initially the UK was not prepared to commit itself to such controls, it now accepts that such controls are necessary. Importantly, it also accepts (unlike the United States of America) that further research is not necessary before targets are set as a precautionary measure – an attitude it had rejected as recently as November 1989. In May 1990 Mrs Thatcher made a speech in which she said that the UK would stabilize carbon dioxide emissions at 1990 levels by 2005.<sup>11</sup> This undertaking is a modest one when compared with some of its fellow EC member states: Denmark, France, and Italy have said that they will stabilize carbon dioxide emissions by 2000 (as has Japan), the Netherlands that it will do so by 1995, and West Germany has undertaken to reduce carbon dioxide emissions by twenty-five per cent by 2005. The UK's undertaking is also modest when one considers that carbon dioxide emissions in the UK have been fairly stable for the past fifteen years or so, fluctuating between a high of 180 million tonnes of carbon emitted in 1979 and a low of 147 million tonnes in 1984.<sup>12</sup> The reason for the lack of ambition in the UK's target is thought to be the Government's desire not to hit the profits of the newly privatized electricity industry (power stations being a major source of carbon dioxide emissions) and the Government's policy of encouraging private transport, which it foresees as more than doubling in amount by 2025. On the other hand, the UK's undertaking to stabilize emissions of carbon dioxide compares favourably with the United States of America, the Soviet Union and Saudi Arabia (all leading emitters of greenhouse gases), none of which is (yet) prepared to acknowledge the need for controlling emissions of greenhouse gases.

It is obviously too soon to say what the UK's ultimate role will be in negotiating a convention and protocols to limit emissions of greenhouse gases, let alone predict whether it will ratify any instruments that may eventually be agreed. From what was said earlier about how emissions of greenhouse gases can be reduced, it is clear, however, that if the UK were to become a party to any instrument controlling emissions of greenhouse gases, it would have a major impact on UK energy, transport, industrial, agricultural, and waste disposal policies and practices – an impact far greater than the phasing-out of CFCs is currently having.

## ACID RAIN

Acid rain is caused principally by emissions of sulphur dioxide from the chimneys of power stations and factories combining with water vapour in the atmosphere to form weak sulphuric acid which is then precipitated as rain or snow. A lesser cause of acid rain are nitrogen oxides, emitted from vehicle exhausts, power stations, nitrogenous fertilizers, and the burning of forests and tropical grasslands, which mix with water vapour to form nitric acid. Acid rain kills fish and other aquatic life in lakes, ponds, and streams; causes

damage and death to trees; and attacks the stone and brickwork of buildings. Because of the wind and the use of tall chimneys on power stations and factories, many states (and the UK is a notable example) export acid rain to other states. For this reason acid rain is an international problem, and therefore is most likely to be successfully tackled if this is done at the international level.

The first international legal step to deal with acid rain was the negotiation and adoption in 1979, under the auspices of the UN's Economic Commission for Europe (whose members include not only all European states but also Canada and the United States of America), of the Convention on Long-Range Transboundary Air Pollution.<sup>13</sup> Under this convention parties are obliged gradually to reduce and prevent air pollution, but because of opposition from some states (notably the UK and West Germany) during negotiation of the convention, no timetable is laid down in the convention as to what extent or by what date this is to be done. This major defect has largely been remedied by the subsequent adoption of two protocols to the convention. The first of these,<sup>14</sup> adopted in 1985, provides that states parties to it are to reduce sulphur dioxide emissions by thirty per cent of 1980 levels by 1993. The second,<sup>15</sup> adopted in 1988, commits its parties to restrict emissions of nitrogen oxides to their 1987 levels by 1994, to apply national emission standards for major new sources, and by 1996 to have adopted control policies based on the critical loads which the environment can tolerate.

Turning now to the role of the UK in the development and implementation of these three instruments, we will use the four-stage framework outlined at the beginning of this paper and used when discussing the Vienna Convention and the Montreal Protocol on the protection of the ozone layer. The UK, as a member of the UN Economic Commission for Europe, took part in the negotiations that led to the adoption of the 1979 convention. As we have seen, the UK was largely instrumental in the convention's containing no specific provisions for dealing with acid rain. The UK claimed that more proof was needed of the connection between sulphur dioxide emissions and acidification of rivers and lakes, and damage to trees before it could agree to a timetable for the control of sulphur dioxide emissions—even though by the mid 1970s such a connection was widely recognized. This position was one consistently taken by successive UK governments since the early 1970s when the Scandinavian states had first begun to complain about the amounts of acid rain reaching them from the UK. No doubt not far from the front of the minds of the UK's negotiators was the cost to the UK, especially to its electricity industry (the main source of sulphur dioxide emissions) and ultimately that industry's customers, of controlling and reducing emissions of sulphur dioxide. And no doubt because the convention contains no specific measures for controlling acid rain, the UK felt able to sign it and subsequently, in July 1982, to ratify it. Because the convention has no specific effect at the domestic level, there has been no need for any implementing action.

Turning now to the sulphur dioxide protocol of 1985, the UK played little part in the negotiation of this protocol. The first negotiations took place

between the ten (later twenty-one) countries of the 'Thirty Per Cent Club', so called because its members had pledged to reduce their emissions of sulphur dioxide by at least thirty per cent of 1980 levels by 1993 at the latest. The UK was not a member of this 'Club' nor did it attend its meetings. The later stages of the negotiations took place in a working group of the executive body of the convention. In view of its attitude during the negotiation of the convention, it is not surprising that the UK has neither signed nor ratified the protocol (although nineteen of the thirty-two parties to the convention had ratified it by the end of 1989). The UK is not the only major acid-rain exporting state party to the convention not to have ratified the protocol: the United States of America, East Germany, and Poland have also not ratified. Interestingly, West Germany, which as we have seen had been, along with the UK, a major opponent of strict emission controls when negotiating the convention, has ratified the protocol: in 1982 it completely changed from its former position when it became clear that it was a major victim of acid rain. The reasons given by the British Government for not ratifying the protocol are that the base year and reduction target are arbitrary and take no account of the substantial reduction in sulphur dioxide emissions in the UK achieved during the 1970s. The Government has also claimed that it would be impossible for the specified reduction in emissions to be met by the 1993 deadline because of the complexity of fitting the necessary flue gas desulphurization (FGD) equipment in power stations and the time taken to get planning permission for this<sup>16</sup> – a claim disputed by the House of Commons Select Committee on the Environment.<sup>17</sup> Since the UK is not a party to the protocol, the question of its implementation does not, of course, arise. Nevertheless, it is interesting to note that it is not entirely inconceivable that the UK may in fact meet the protocol's obligation of a thirty per cent reduction of sulphur dioxide emissions by 1993: in 1988 emissions were just over twenty-four per cent down on 1980 levels<sup>18</sup> (although much of this reduction is due to the economic recession of the early 1980s rather than to any conscious effort to limit emissions). The Government itself in 1988 estimated that its FGD programme would achieve a thirty per cent reduction by the late 1990s.<sup>19</sup>

Even if the UK is not a party to the protocol, a combination of diplomatic pressure and EC obligations is forcing it in the same direction as the protocol's targets. As mentioned above the Scandinavian states have complained for many years about the export of acid rain from the UK to Scandinavia. On the eve of an official visit by Mrs Thatcher to Norway in 1986, it was announced – and surely the timing of this announcement was not purely coincidental – that the Government had authorized the Central Electricity Generating Board to spend £1 billion on retrofitting three 2000 megawatt power stations with FGD equipment, fitting low nitrogen oxide burners to twelve major coal-fired power stations, and requiring all new coal-fired power stations to be fitted with acid gas emission control technology. Further impetus has come from the EC, which in 1988 adopted the large combustion plants directive.<sup>20</sup> This directive requires the UK to reduce emissions of sulphur dioxide from existing combustion plants of 50 megawatts or more (which include most power

stations) by twenty per cent of 1980 levels by 1993, by forty per cent by 1998 and by sixty per cent by 2003. Although the Government originally reckoned it would be necessary to double the FGD programme to meet these targets, early in 1990, following the privatization of the electricity generating industry and undoubtedly as a consequence of it, it was announced that there would be no doubling of the FGD programme: instead the existing programme would be completed and a combination of the use of gas and imported low-sulphur coal would be utilized to meet the obligations of the directive.<sup>21</sup> It remains to be seen whether this approach will be successful: the Select Committee on Energy has, however, questioned whether this approach is legitimate, given that the targets for the UK in the directive were set on the understanding that they would be met primarily through the use of FGD.<sup>22</sup>

Returning now to the 1979 Convention and its protocols, it remains to examine the 1988 protocol on nitrogen oxides emissions. The writer has not been able to discover what role the UK played in the negotiation of this protocol. The UK signed the protocol when it was opened for signature in November 1988, but as at the end of 1989 had not ratified it (although eight other states had done so). Because the UK is not (yet) a party to the protocol, the question of its implementation does not arise. Although the UK signed the protocol when it was opened for signature, it declined to sign a declaration adopted at the same time as the protocol, which, although not legally binding, urges its signatories to reduce nitrogen oxides emissions in the order of thirty per cent from a baseline of any year between 1980 and 1986 by 1998, on the grounds that the Government 'did not think it right to commit ourselves both to an arbitrary percentage date for 1998 and to the quite different 'critical loads' approach of the protocol for the earlier date of 1996.'<sup>23</sup>

Even though the UK is not a party to the protocol and has not signed the declaration, as with the sulphur dioxide protocol EC obligations are pushing it in the same direction. The large combustion plants directive (already referred to) requires the UK to reduce emissions of nitrogen oxides from existing large combustion plants by fifteen per cent of 1980 levels by 1993 and by thirty per cent by 1998. Secondly, Directive 89/458<sup>24</sup> sets strict standards for the emission of nitrogen oxides in the exhausts of all new cars with engines of less than 1400 cc built after 1992: similar standards are planned for larger cars.

To sum up the position on acid rain: the UK's role in developing international law to combat acid rain has been almost entirely a negative one. Because the UK is not a party to either of the relevant protocols, the international law that has so far been developed has had no impact on law and policy in the UK. Instead, external factors influencing UK policy have been various EC obligations and, to a lesser extent, diplomatic pressure from Scandinavian states not members of the Community. Internal factors which have shaped UK policy are, of course, beyond the bounds of this paper.

## THE DUMPING OF WASTE AT SEA

For many years states have disposed of some of their waste by dumping it directly in the sea from ships. Although not the most important source of marine pollution, dumping is nevertheless a significant source, and has given rise to a good deal of controversy in western Europe in recent years, particularly in relation to the dumping activities of the UK. Dumping is particularly interesting as an object of study, not only for this reason, but also because it illustrates all three types of international environmental law-making referred to at the beginning of this paper and the relationship between them.

Dumping has been regulated at the international legal level in the North Sea and north-east Atlantic since 1972 by the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft<sup>25</sup> (usually known as the Oslo Convention). The convention prohibits the dumping of some of the more noxious kinds of waste, and provides that other kinds of waste may be dumped only if a permit has been obtained and, in the case of some wastes, only in certain areas. The convention also established an international commission (the Oslo Commission) to oversee the operation of the convention. The UK ratified the convention in 1975, implementing it by means of the Dumping at Sea Act 1974, which was subsequently repealed and replaced by Part II of the Food and Environment Protection Act 1985.

At this point we must introduce a new international forum. In 1984 the North Sea states, concerned at the increasing pollution of the North Sea, met in Bremen and drew up a declaration on the protection of the North Sea. A second conference of North Sea states was held in London in 1987 and produced a further declaration. More recently, in March 1990, the third conference was held in The Hague and again issued a declaration. These three North Sea declarations all call for various forms of action to be taken to reduce pollution of the North Sea. It is generally considered that the declarations are not as such legally binding, but are a form of 'soft law' referred to at the beginning of this paper.<sup>26</sup>

As far as the dumping of waste is concerned, the North Sea declarations focus particularly on the dumping of industrial waste and the dumping of sewage sludge. While the Bremen declaration contains a general but rather imprecise exhortation to reduce dumping, the London declaration contains much more precise and detailed provisions for reducing these two forms of dumping, even though, it is important to note, such dumping was at the time of the adoption of the London declaration perfectly lawful under the Oslo Convention. We will consider the London (and Hague) declarations' provisions on industrial waste and sewage sludge separately and in each case look at the UK's response.

Paragraph 22(a) of the London declaration, though not without some ambiguity,<sup>27</sup> essentially provides that the dumping of industrial waste in the North Sea must be phased out by the end of 1989 except for wastes for which there is no practical alternative disposal on land and which pose no risk to the

marine environment. This provision was reinforced by a decision of the Oslo Commission adopted in June 1989 to the same effect,<sup>28</sup> which added that the exceptional wastes whose dumping could continue must be shown to the commission to meet the necessary conditions (no alternative disposal, no risk to the marine environment) through a procedure, called the prior justification procedure, under which a state proposing to dump waste of this category must notify the commission and give other states an opportunity to put their point of view as to whether the proposed dumping complies with the stipulated conditions.

The UK dumps two main types of industrial waste – fly ash from power stations and liquid industrial waste. In the case of fly ash, a licence to continue dumping in 1990 was granted, and such dumping actually began in January 1990. At that time no report had been made to the Oslo Commission as required under the prior justification procedure. This was clearly contrary to the Oslo Commission's decision of 1989 and against the spirit, if not the strict wording, of the London declaration. Whether the matter has subsequently been resolved in accordance with the prior justification procedure the writer has not been able to establish. In the case of liquid industrial waste, the UK had by the end of 1989 reduced the number of operations licensed for dumping to eight (as compared to twenty in 1987). These licences, unlike the fly ash licences, were notified to the Oslo Commission in accordance with the prior justification procedure and drew objections from other North Sea states: nevertheless, dumping took place in early 1990 before all the steps under the procedure were completed. Again, this was a breach of the Oslo Commission's decision and of the spirit of the London declaration. The UK Government has announced that it intends to phase out industrial waste dumping by the end of 1992, apart from two licences which will be extended into 1993 (which in fact happen to be for the largest amounts of waste).<sup>29</sup> This appears to pre-empt use of the prior justification procedure in future years. The other North Sea states appear to have acquiesced in this, since the Hague declaration (in paragraph 18) simply notes the UK's undertaking, though it does add that continued dumping will be subject to paragraph 22(a) of the London declaration (referred to above).

Turning now from industrial waste to sewage sludge, the latter is the residue left after the treatment of the liquid and solid wastes discharged into sewers. Because many industrial premises discharge their waste into sewers, sewage sludge contains not only matter originating from domestic use of the sewerage system but also remains from industrial wastes, many of which are toxic. In recent years the UK has been the only state dumping sewage sludge in the North Sea: altogether the UK disposes of about thirty per cent of its sewage sludge by dumping it at sea (the remainder is spread on agricultural land (forty-five per cent), goes to landfill (twenty per cent) or incinerated (five per cent). Paragraph 22(c) of the London declaration provides that the contamination of sewage sludge by persistent, toxic, or bioaccumulable materials should be not increased above 1987 levels and should eventually be reduced. At the time of writing, only limited figures exist to show whether this



obligation is being met.<sup>30</sup> In 1988 the amounts of mercury, cadmium, copper, lead, and zinc dumped with sewage sludge were all significantly less than in 1987.<sup>31</sup> In the longer term it will no longer be necessary to look at these figures, as in March 1990, a few days before the third North Sea conference began in the Hague, the British Government announced that the dumping of sewage sludge at sea would be terminated by the end of 1998.<sup>32</sup> This undertaking was noted in the Hague declaration (paragraph 15). The reason for the UK's decision to phase out the dumping of sewage sludge, even though not required by the London declaration, is undoubtedly because of the pressure it has come under, and criticism it has received, from other North Sea states.

Looking at the question of pollution of the North Sea from dumping with the double focus outlined at the beginning of this paper, it is clear, first, that the UK has made no positive contribution to the development of the law in this area through the work of the North Sea conferences and the Oslo Commission – rather its efforts to resist such development have largely been responsible for the ambiguities that abound in the conference declarations and the Oslo Commission's decision of 1989. Secondly, it is also clear that the developments referred to have had and will have a significant impact on British waste disposal practices. The reason why the UK is the odd man out on this issue (and why it has not properly complied with the London declaration) would seem to be because of a fundamental difference of pollution control philosophy between itself and its North Sea neighbours. The UK regards it as permissible to dump waste in the sea unless and until it can be scientifically proved that it causes harm to the marine environment, whereas the other North Sea states espouse the precautionary principle, and argue that waste should only be dumped if it poses no risk to the marine environment. It may be that the Government's stance over dumping can also be explained by its desire not to impose on companies dumping waste the additional expenditure which would have been necessary in order to have secured full compliance with the London declaration and the Oslo Commission's decision.

## WILDLIFE CONSERVATION

There are a considerable number of treaties, both regional and global, concerned with the conservation of wildlife. This section focuses on what has proved to be the most significant treaty for the conservation of wildlife in Europe, the Berne Convention on the conservation of European wildlife and natural habitats.<sup>33</sup> The convention has two broad aims, the conservation of flora and fauna and the preservation of habitats. As regards the first, parties must prohibit the deliberate picking or collecting of the species of flora listed in Appendix I of the convention; must prohibit the deliberate killing of the species of fauna listed in Appendix II; and regulate the exploitation of the species of fauna listed in Appendix III so that their population levels are not endangered. As regards habitats, Article 4 imposes a general obligation to take the necessary 'measures to ensure the conservation of the habitats of the



wild flora and fauna species, especially those specified in the Appendices I and II, and the conservation of endangered natural habitats', while Article 6 prohibits deliberate damage to or destruction of the breeding or resting sites of Appendix II species.<sup>34</sup>

In looking at the role of the UK in relation to the Berne Convention, we will use the four-stage framework suggested at the beginning of this paper, examining in turn its role in respect of the negotiation of the convention, participation, formal implementation, and practical implementation. As regards the first of these, there appear to be no public records of the negotiation of the convention (which occurred under the aegis of the Council of Europe), so that it is impossible to say what role the UK played in the drawing up of the convention. As regards participation, the UK signed the convention when it was opened for signature and ratified it on 28 May 1982. The main legislation implementing the convention is the Wildlife and Countryside Act 1981,<sup>35</sup> though a number of other pieces of legislation, such as the Conservation of Seals Act 1970 and the Badgers Act 1973, are also relevant to the implementation of the convention. Both the formal implementation of the convention in the UK and especially its practical implementation have defects and deficiencies. For reasons of space, only a few examples can be given of such defects and deficiencies.<sup>36</sup>

The UK's record of compliance with the obligations of the Berne Convention relating to the conservation of flora and fauna is, on the whole, reasonably good, though there are some deficiencies. These include the failure to regulate the killing of certain Appendix III species (e.g. adders, frogs, and toads), contrary to Article 7; deficiencies in the licensing system for the sale of Appendix III species and the almost wholly ineffective enforcement of this system; and allowing seals to be killed for interference with fisheries, and in ways that do not seem to be wholly in accordance with the convention.

The major problems have come in relation to the convention's obligations concerning habitat protection. British legislation provides two main forms of protection for wildlife habitats – nature reserves (of which there are about 400) and sites of special scientific interest (SSSIs) (of which there are about 5,300). While nature reserves give complete protection to all the habitats they cover, SSSIs have a number of drawbacks. While it is normally an offence to damage or destroy an SSSI (though in practice prosecutions for this offence, which appears to have been committed on numerous occasions, are rare), there are a number of ways in which it is perfectly legitimate to damage or destroy an SSSI: for example, if planning permission to develop a site has been granted by the relevant planning authority (and this has happened on dozens of occasions) or under a private Act of Parliament. A further weakness in the protection of habitats in the UK is that habitats outside nature reserves and SSSIs are relatively unprotected: they can legitimately be destroyed or damaged if this is the 'incidental result of a lawful operation and could not reasonably have been avoided'.<sup>37</sup> Such unprotected habitats include a number of habitats of major importance to various Appendix II species. Many of these habitats have in fact in recent years been legitimately damaged or destroyed:

for example, many breeding ponds of great crested newts, the nests and habitats of corncrake in the Hebrides as a result of changes in farming practices, and Dorset heaths which are the home of the smooth snake. Overall, there is little doubt that the UK has failed to comply fully with its obligations under the Berne Convention to protect habitats. However, it is only fair to put this failure in to some kind of international context, and point out that every party to the convention, to a greater or lesser extent, is guilty of the same failure.<sup>38</sup> The reason why the UK has not complied sufficiently with its obligations under the Berne Convention to preserve habitats is due at least in part to the fact that environmental considerations do not enjoy any priority when public authorities decide whether to permit the development of land: as a senior civil servant in the Department of the Environment explained to a House of Lords Committee recently, a balance between economic and environmental interests must be struck and there is no 'preconception of which way the balance must fall'.<sup>39</sup>

So far we have looked at the Berne Convention in terms of the UK's participation in the convention. We must now turn to consider the second aspect of the double focus used in this paper – the impact of the convention on policy and practice in the UK. This has in fact been relatively limited. Many species of fauna and flora were protected before the Wildlife and Countryside Act 1981 under earlier legislation, although the 1981 Act has added new species for protection as required by the convention. The main forms of habitat protection, nature reserves and SSSIs, were already in place well before the convention was adopted.

## CONCLUSIONS

The four environmental issues discussed in this paper – global warming and protection of the ozone layer, acid rain, the dumping of waste at sea, and the Berne Convention – show a rather mixed record in terms of the UK's contribution to the development of international environmental law, ranging from the moderately positive in the case of global warming and protection of the ozone layer to the distinctly negative in the case of acid rain and the dumping of waste at sea. A supporter of the British Government might argue that the author has concentrated on too many issues where the UK's record is poor and thus has given a distorted picture. It is true that there are some international environmental issues where the UK has a good record, such as whaling (though the good record here is not unconnected with the fact that the UK has no economic interest in whaling) and, possibly, pollution from ships. Equally, however, there are a number of other issues where the UK's record is poor, such as radioactive discharges from Sellafield and marine pollution from certain land-based sources. The author would contend, though of course without a full study of every issue he cannot prove, that the picture given of the UK's international environmental record in this paper is not an unrepresentative or misleading one. From that picture it can be seen that in any kind

of international league table the UK's performance in relation to the four issues considered in this paper falls short of its most obvious comparators, the other states of north-west Europe and particularly its fellow members of the EC. On the other hand, the UK does have a better record than one or two other developed states, notably the United States of America.

As with domestic environmental issues, the British Government's actions in relation to international environmental issues fall well short of its rhetoric. Statements such as 'Britain has taken the lead [on global warming] and will continue to do so'<sup>40</sup> and 'Britain is playing a major role in international steps to control acid rain'<sup>41</sup> are, on the evidence of this paper, exaggerations: indeed, the second statement is so far from the truth as to be downright dishonest. The reasons for this gap between actions and words are largely the same as with domestic issues: the Government's general aversion to regulation; its desire not to increase costs to industry, particularly of industries that have recently been privatized; a philosophy of pollution control that requires rigorous scientific proof before action is contemplated (though an exception is made for global warming); and, more generally, an inability to accept that current patterns of economic life, transport, and so on in the UK require far-reaching changes if there is to be a real commitment to the environment.

Where by its actions the UK has accepted international obligations, its record in implementing them has often been defective (as in the case of the Berne Convention) and in some cases where the record is good (as with the Montreal Protocol on the ozone layer) the Government cannot take the credit. Whatever the record of implementation, it is clear that the UK's international environmental obligations have had and continue to have a significant impact on domestic environmental law and policy in the UK.

## NOTES AND REFERENCES

- 1 For a fuller discussion of this point, see Y. van der Mensbrugghe, 'Legal Status of International North Sea Conference Declarations' in *The North Sea: Perspectives on Regional Environmental Co-operation*, eds. D. Freestone and T. IJlstra (1990) 15–22.
- 2 Text in (1987) XXVI *International Legal Materials* (hereafter ILM) 1516.
- 3 Text in id., p. 1541.
- 4 N. Haigh, *EEC Environmental Policy and Britain* (2nd ed. 1987) 269. Jachtenfuchs suggests that largely because of British pressure EC states were not prepared in the negotiations on the Vienna Convention to agree to any specific proposals to control the production and consumption of CFCs. He also says that the UK (and France) were responsible for giving the Commission a very restrictive mandate to negotiate on behalf of the EC in the negotiations on the Montreal Protocol. See M. Jachtenfuchs, 'The European Community and the Protection of the Ozone Layer' (1990) XXVII *J. of Common Market Studies* 261 at 263, 265–6. He also suggests that the position of the UK Government was largely influenced by the views of ICI: see, e.g., pp. 268, 270.
- 5 House of Lords Select Committee on the European Communities, Seventeenth Report, *The Ozone Layer: Implementing the Montreal Protocol, Session 1987–88* (1988; H.L. 94) 10–12.
- 6 Regulation 3322/88, *Official Journal of the European Communities* (hereafter OJ) 31.10.88 L297.
- 7 Lord Reay, 515 *H.L. Debs.*, col. 779 (6 February 1990).

- 8 Decision 80/372, OJ 3.4.80 L90.
- 9 op. cit., in n. 7, col. 780; Department of the Environment, *Air Pollution*, (1988; Cm. 552) 5, 14.
- 10 OJ 4.4.90 C86.
- 11 *The Guardian*, 26 May 1990. This undertaking was repeated in the Government's White Paper of September 1990, *This Common Inheritance: Britain's Environmental Strategy*, (1990; Cm. 1200) 64, 68. For the strategy to achieve this goal, see pp. 68–78, 283–291. On the other hand, in November 1989 a Government minister had said that 'we believe that, as a first step, we should be looking to the year 2000 as the date by which CO<sub>2</sub> emissions are stabilised': Mr. Trippier, 159 *H.C. Debs.*, col. 1305 (10 November 1989).
- 12 Department of the Environment, *Digest of Environmental Protection and Water Statistics*, No. 12 1989 (1990) 24.
- 13 Text in (1979) XVIII ILM 1442. For an analysis of the convention, see A. Rosencranz, 'The ECE Convention of 1979 on Long-Range Transboundary Air Pollution' (1981) 75 *Am. J. of International Law* 975–82. See also id., 'The Acid Rain Controversy in Europe and North America: A Political Analysis' in *International Environmental Diplomacy*, ed. J.E. Carroll (1988) 173–87.
- 14 Text in (1988) XXVII ILM 698.
- 15 Text in (1989) XXVIII ILM 212.
- 16 82 *H.C. Debs.*, col. 202 (Written Answers) (4 July 1985); op. cit., n. 9, p. 9.
- 17 Select Committee on the Environment, First Report, *Air Pollution, Session 1987–88* (1988; H.C. 270) xxix.
- 18 op. cit., n. 12, p. 12.
- 19 loc. cit. in n. 16.
- 20 Directive 88/609, OJ 7.12.88 L336.
- 21 Select Committee on Energy, Third Report, *The Flue Gas Desulphurisation Programme, Session 1989–90* (1990; H.C. 371) ix, xi.
- 22 id., pp. xix–xx.
- 23 142 *H.C. Debs.*, col. 278 (Written Answers) (30 November 1988).
- 24 OJ 3.8.89 L226.
- 25 UK Treaty Series 1975, No. 119.
- 26 For detailed studies of the history, legal status, and content of the North Sea declarations, see Freestone and IJlstra, op. cit., n. 1.
- 27 See, further, J. Gibson and R.R. Churchill, 'Problems of Implementation of the North Sea Declarations: A Case Study of the United Kingdom' in Freestone and IJlstra, op. cit., n. 1, p. 47 at 58–60.
- 28 Oscom Decision 89/1 of 14 June 1989 on the Reduction and Cessation of Dumping Industrial Wastes at Sea. It is a moot point whether this decision is legally binding: see Gibson and Churchill, op. cit., n. 1, pp. 59–60.
- 29 167 *H.C. Debs.*, cols. 898–9 (Written Answers) (22 February 1990). See also Mr. Curry, 165 *H.C. Debs.*, cols. 1165–70 (25 January 1990).
- 30 One problem is that for some of the contaminants figures for the amounts dumped prior to 1988 do not exist.
- 31 op. cit., n. 12, p. 33.
- 32 168 *H.C. Debs.*, col. 487 (Written Answers) (5 March 1990).
- 33 UK Treaty Series 1982, No. 56.
- 34 For a detailed discussion of the convention, see S. Lyster, *International Wildlife Law*, (1985) ch. 8.
- 35 The Act applies only to Great Britain. For the corresponding legislation for Northern Ireland, see the Wildlife (Northern Ireland) Order 1985 and the Nature Conservation and Amenity Lands (Northern Ireland) Order 1985.
- 36 For a fuller account, see S. Lyster, *European Wildlife Convention: Report on Problems in the UK*, (1985).
- 37 Wildlife and Countryside Act 1981, ss. 4(2), 10(3), and 13(3). An exception is made for bats whose habitats are completely protected.

- 38 International Union for Conservation of Nature and Natural Resources, *Implementation of the Bern Convention* (1986) 10–11, 13–15.
- 39 House of Lords Select Committee on the European Communities, Fifteenth Report, *Habitat and Species Protection, Session 1988–89* (1989; H.L. 72) 10.
- 40 Mrs. Thatcher's speech to the 1989 Conservative Party Conference, quoted in (1990) 9 *Earth Matters* 10.
- 41 op. cit., n. 11, p. 148.